Supreme Court, U.S.
FILED
JUL 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-2004 and 88-7439

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT M. ADLER, PETITIONER

v.

UNITED STATES OF AMERICA

EDWARD HELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

	Page
Constitution:	
U.S. Const. Amend. IV	2
Statutes:	
18 U.S.C. 1341	2
18 U.S.C. 2314	2
26 U.S.C. 7201	2

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Petitioners contend that the court of appeals erred in reversing an order dismissing an indictment against them.

1. On July 26, 1984, petitioners were charged in an 11-count indictment returned in the United States District Court for the Southern District of Florida. The indictment charged both petitioner Heller, the promoter, and petitioner Adler, a lawyer, with five counts of mail fraud, in

violation of 18 U.S.C. 1341. Petitioner Heller was also charged with four counts of transporting fraudulently obtained property through interstate commerce, in violation of 18 U.S.C. 2314, and two counts of making false statements on his income tax returns, in violation of 26 U.S.C. 7201.

The charges against petitioners are described in the opinion of the court of appeals (Adler Pet. App. 2a-8a). Briefly, the indictment charged that between 1976 and 1979, petitioners devised a scheme to defraud investors and the Internal Revenue Service by creating and selling limited partnerships in a company that was ostensibly engaged in buying and selling shrubbery. The partnerships, if they had functioned as represented, would have generated tax deductions in excess of the cash contribution by each limited partner. The validity of the deductions depended in part upon the validity of a series of monetary transactions on December 17, 1979, including loans made to the partnership by Fin Serve, an entity under petitioner Heller's control. Clariden Bank of Zurich, Switzerland, loaned the cash to Fin Serve that Fin Serve loaned to the partnerships. If the loans lacked economic substance, the limited partners' claimed deductions would not be respected for tax purposes.

On January 20, 1987, the district court dismissed the five mail fraud counts and three of the fraudulently obtained property counts following an evidentiary hearing at which several Swiss and American banking experts testified. Pet. App. 20a-33a. The court found that, as a matter of Swiss banking law, the loans from Clariden Bank to Fin Serve were real and not fictitious and that the funds that circled among the parties on December 17, 1979, were not fictitious but real. Accordingly, the district court concluded that as a matter of law the allegations of the indictment could not be proved. Alternatively, the district court

ruled as a matter of law that neither petitioner could have formed the requisite criminal intent, because the absence of any Internal Revenue Service statement or court opinion condemning similar schemes and the conflicting opinions of tax experts demonstrated legal uncertainty as to the tax consequences of the scheme.

2. The court of appeals reversed (Adler Pet. App. 1a-15a), concluding that the district court's findings about Swiss banking law were irrelevant to the legal sufficiency of the indictment. The court held that the indictment adequately alleged that petitioners sought to defraud the limited partners and the Internal Revenue Service by representing that the Fin Serve loans could enable the partners to realize a tax benefit, and that a jury could find that petitioners defrauded the partners and the Service if they found that this representation was baseless. The court also ruled that petitioners could have formed the requisite criminal intent.

3. Petitioner Adler contends (Adler Pet. 17-25) that the court of appeals erred because his written tax opinion about the shelters was correct as a matter of law and because legal uncertainty about the pertinent law makes it impossible to infer that he issued the opinion with fraudulent intent. Petitioner Heller contends (Heller Pet. 9-17) that the indictment violates his right to due process of law because the applicable tax law was so vague that he could not have the requisite intent to violate the law. Whatever the merits of petitioners' contentions they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motions to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will be able to raise their

current contentions, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

JULY 1989

* Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petitions. We will file a response on the merits if the Court requests.

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699:00341